87-442
No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

PENNSYLVANIA DRILLING COMPANY, INC.,
Petitioner,

v.

WILLIAM SORBA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

What is the burden of an age discrimination plaintiff to show that an employer's legitimate reason for discharge was pretextual?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

Factual Background 2

DISTRICT COURT DECISION 3

THIRD CIRCUIT OPINION 4

REASON FOR GRANTING THE WRIT 5

Factual Basis for Discharge 6

Age Discrimination Nexus 9

Pretext of Some But Not All

Business Reasons 10

CONCLUSION 13

APPENDIX 23

TABLE OF AUTHORITIES

Cases: Page

Ackerman v. Diamond Shamrock Corporation, 670 F.2d 66 (6th Cir. 1982) 9, 12

Anderson v. Liberty Lobby, Inc., _____ U.S. _____, 106 S. Ct. 2505, 107 S. Ct. 2343 (1986) 6

Celotex Corporation v. Catrett, _____ U.S. _____, 106 S. Ct. 2548 (1986) 6

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987) 4

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986) *cert. denied*, _____ U.S. _____, 107 S. Ct. 954 (1987) 6, 9, 12

Dea v. Look, 810 F.2d 12 (1st Cir. 1987) 7, 9, 11

Douglas v. Anderson, 656 F.2d 528 (9th Cir. 1981) 6, 8

Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S. Ct. 2943 (1978) . . . 10, 11

Gray v. New England Telephone and Telegraph Company, 792 F.2d 251 (1st Cir. 1986) 7, 9

Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161 (8th Cir. 1985) 7

Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980) 5, 7, 13

Leichihmam v. Pickwick International and American Can Co., 814 F.2d 1263 (8th Cir. 1987) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 10

Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir.) *cert. denied*, 464 U.S. 1018 (1983) 9

Parcinski v. Outlet Company, 673 F.2d 34 (2nd Cir. 1982) 7

Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983) 9

Thornbrough v. Columbus and Greenville Railroad Company, 760 F.2d 633 (5th Cir. 1985) 8

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981) 5, 8

White v. Vathally, 732 F.2d 1037 (1st Cir.) *cert. denied*, 469 U.S. 933, 105 S. Ct. 331 (1984) 7, 9

Wilkins v. Eaton Corporation, 790 F.2d 515 (6th Cir. 1986) 7

Statutes

28 U.S.C. §1254(1) 2
29 U.S.C. §621 *et seq.* 2
29 U.S.C. §623 (a) (1) 2
29 U.S.C. §623 (f) (1) 2

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WILLIAM SORBA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Pennsylvania Drilling Company, Inc., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 18, 1987.

OPINIONS BELOW

The Panel Opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit") is attached as Appendix A.

The Opinion of the United States District Court for the Western District of Pennsylvania ("District Court") is attached as Appendix B.

STATEMENT OF JURISDICTION

The Third Circuit Court of Appeals rendered its judgment on June 18, 1987. Its decision addressed an

important question concerning evidentiary burdens under the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. (ADEA) in a manner conflicting with the decision of a majority of the other United States Circuit Courts of Appeal. The jurisdiction of this Honorable Court is thereby established pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AT ISSUE

The ADEA provides:

> It shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age . . .

29 U.S.C. §623(a)(1).

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c) or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . .

29 U.S.C. §623(f)(1).

STATEMENT OF THE CASE

Factual Background

On April 8, 1983, Petitioner, Pennsylvania Drilling Company, (hereinafter "Pennsylvania Drilling"), a small business, discharged Respondent, William Sorba (hereinafter "Sorba") from his employment as a driller. As a driller, Mr. Sorba had significant supervisory responsibilities, including responsibility for the overall completion of his drilling jobs. Mr. Sorba filed suit asserting that this discharge, which occured when he was 54 years old, was in violation of the Age Discrimination in Employment Act (hereinafter "ADEA").

In response to Sorba's suit, Pennsylvania Drilling articulated legitimate business reasons for the discharge, including:

(1) poor work performance;

(2) complaints about performance by customers;

(3) padding jobs by slowing work activity to obtain extra overtime pay;

(4) disruptive attitude.

These activities and the discharge took place when Pennsylvania Drilling was suffering serious financial losses and in an economic crisis.

Extensive discovery was taken by both parties. Mr. Sorba, in his deposition, admitted complaints from customers and supervisors about his performance during his last three jobs for the company and that very poor results were achieved on these jobs. Mr. Sorba also admitted the financial crisis of the company at this time.

In Answers to Interrogatories, Mr. Sorba suggested that his discharge may have been because the President of Pennsylvania Drilling could not control him.

Mr. Sorba admitted the absence of any direct evidence of age discrimination. Further, Pennsylvania Drilling's statistical evidence that 65% of all Pennsylvania Drilling drillers were over age 40 was not contested. However, Mr. Sorba claimed that the poor results on these jobs were not his fault, disputed that he was padding any job and challenged the perception of his attitude as "disruptive." He cited the deposition of various supervisors who admitted that there were some on-site physical problems at the jobs. However, they restated a belief that Mr. Sorba was not performing as well as he could have.

DISTRICT COURT DECISION

The District Court granted Pennsylvania Drilling's Motion for Summary Judgment. As the District Court stated:

> Even if plaintiff performed admirably under the most adverse of circumstances yet defendant held him responsible for the poor results or, in the alternative, merely fired plaintiff as a scapegoat, this does not establish an ADEA violation. *See Miller v. General Electric Company*, 562 F. Supp. 610, 617 (E.D. Pa. 1982) (an employer's reasons for discharge may be subjective, short-sighted and narrow minded as long

as age is not a determinative factor.) Moreover, if we accept everything the plaintiff says as true, this would lead to the conclusion that plaintiff was fired because the boss felt that plaintiff was too independent for the boss to control. This does not establish age discrimination. Taken as a whole, we do not find that plaintiff's circumstantial evidence establishes a reasonable inference that defendant fired him because of his age. A mere assertion, conjecture, or speculation by the plaintiff is not sufficient to establish a material factual dispute. (B-5)

THIRD CIRCUIT OPINION

Specifically relying on its decision in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3rd Cir. 1987), the Third Circuit reversed the summary judgment.[1] The Third Circuit announced its standard to be whether the employee introduced "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge [which] reasonably *could* support an inference that the employer did not act for non-discriminatory reasons." *supra*, at 900. In applying this standard, the Third Circuit ignored Mr. Sorba's admissions of poor results on his last three jobs and testimony of supervisors that Sorba's performance was slower than expected. Instead, the Third Circuit focused on Mr. Sorba's "evidence" that his supervisors could have realized the poor results were not his fault. This evidence consisted of statements by Mr. Sorba and by certain supervisors of problems with equipment and job site conditions.

Examining the record in the light most favorable to Sorba, the Third Circuit determined that the testimony of Mr. Sorba's supervisors "was inconsistent regarding whether they believed Sorba's performance

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[1]A Petition for Writ of Certiorari has been filed on *Chipollini, supra*, sub nom. *Spencer Gifts, Inc. v. Chipollini*, No. _____, October term 1987. No disposition on this Petition has yet occured.

caused the unsatisfactory results."[2] The Third Circuit attempted to distinguish the apparently opposite holding of the Seventh Circuit in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980) by asserting that the factual record was different. Relying on *Chipollini, supra*, the Third Circuit reversed Pennsylvania Drilling's summary judgment despite the absence of any nexus between the discharge and age discrimination.

REASON FOR GRANTING THE WRIT

A Conflict Exists Between the Third Circuit and, in part, Fifth Circuit with the majority of Other Circuit Courts as to the Age Discrimination Plaintiff's Burden of Proof of Pretext

A Writ of Certiorari is appropriate in the instant case because a conflict exists between the Third Circuit and certain other Circuits and a majority of the other Circuit Courts of Appeal concerning a major issue of federal law. The question presented is "What evidence must a plaintiff present to satisfy his burden of proof that an employer's legitimate explanations for discharge are pretextual?"

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981), this Honorable Court held that an ADEA plaintiff could prove his case by showing that the employer's legitimate reasons for discharge were "unworthy of credence" or pretextual. Guidance by this Honorable Court is needed to resolve conflict in the Circuits and clarify the appropriate burden of proof which plaintiff must meet to make this showing. This is especially critical given the vast number of ADEA lawsuits, the drain of questionable ADEA lawsuits on judicial resources and employer financial stability, and the important right of defendants to

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[2]In viewing the record most favorable to the non-movant Mr. Sorba, the Third Circuit searched for inconsistencies, ignoring numerous statements by supervisors of dissatisfaction with Mr. Sorba's performance. The Third Circuit also ignored the statements of Pennsylvania Drilling's president and supervisors concerning Mr. Sorba's detrimental influence on morale, because such statements were based on hearsay.

summary judgment in assumpsit cases. *See Celotex Corportion v. Catrett*, _____ U.S. _____, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, 106 S. Ct. 2505, 107 S. Ct. 2343 (1986).

The Third Circuit decision, in the case at bar, announces a standard which is in conflict with other jurisdictions in the following three ways:

(1) by permitting an inference of age discrimination due to an employee's dispute of the factual basis for the employer's legitimate reason;

(2) by permitting such an inference without any evidence directly or indirectly relating to age; and

(3) by permitting this inference despite uncontraverted admissions by the employee of justifiable non-age related reasons for the discharge.

Each of these three elements of the Third Circuit's analysis in *Sorba* is contradicted by decisions in most other Circuits.

FACTUAL BASIS FOR DISCHARGE

The First, Second, Sixth, Seventh, and Eighth Circuits have all held that the factual basis of the employer's reasons for discharge is not an issue in an age discrimination case. However, the approach of the Third Circuit, permitting an analysis of the factual basis is supported by the Fifth Circuit. The Ninth Circuit, in *Douglas v. Anderson*, 656 F.2d 528 (1981), stated an approach which permits consideration of the factual basis, but only to determine if sufficient evidence exists to establish a legitimate concern of the employer.

As the Seventh Circuit held in *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986) *cert. denied*, _____ U.S. _____, 107 S. Ct. 954 (1987), in affirming summary judgment for the defendant employer, "The Court does not sit as a super-personnel department that re-examines an entity's business decisions. The question is not whether the Tribune [employer] exercised prudent business judgment, but

whether Dale [the employee] has come forward to refute the articulated legitimate reasons for his discharge." *See also Kephart, supra*, at 1223 (The ADEA "was not intended as a vehicle for judicial review of business decisions.")

Similiarly, the First Circuit affirmed summary judgment for the employer in *Dea v. Look*, 810 F.2d 12, 15 (1st Cir. 1987), holding that "evidence contesting the factual underpinnings of the reason for the discharge proferred by the employer is insufficient" to meet the burden of proof of age discrimination. *See also Gray v. New England Telephone & Telegraph*, 792 F.2d 251, 255 (1st Cir. 1986) ("Finally, although Gray did present evidence contesting the factual underpinnings of the reasons proferred by NET for firing Gray, these, without more are insufficient in the case to present a jury question."); *White v. Vathally*, 732 F.2d 1037, 1042 (1st Cir.) *cert. denied*, 469 U.S. 933, 105 S. Ct. 331 (1984) ("Our review does not extend to the quality of business judgment . . .").

The Second Circuit in *Parcinski v. Outlet Company*, 673 F.2d 34, 37 (2nd Cir. 1982) stated that "The [ADEA] does not authorize the courts to judge the wisdom of a corporation's business decisions." In *Parcinski, supra*, a jury verdict for an age discrimination plaintiff was reversed because plaintiff's evidence put the business decisions of the employer in a bad light, but did not establish age discrimination.

In *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir. 1986), the Sixth Circuit granted judgment notwithstanding the verdict for the employer holding that "the factfinder may not focus on the soundness of the employer's business judgment."

The Eighth Circuit in *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161, 1166 n.8 (8th Cir. 1985) granted judgment notwithstanding the verdict to the employer noting that "The ADEA is not intended to be used as a means of reviewing the propriety of a business decision on the part of the employer."

The Third Circuit standard, which authorizes a judicial inquiry into the factual basis for the employer's legitimate business reasons, is also applied by the Fifth

Circuit. Although citing the general language that the ADEA is not a vehicle for second guessing business decisions, in *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633 (5th Cir. 1985), the Fifth Circuit required such an inquiry. In reversing the District Court's grant of summary judgment, the Fifth Circuit relied upon plaintiff employee's proffer of evidence that plaintiff was, in fact, better qualified than retained younger employees. The Fifth Circuit held that the factfinder is entitled to conclude that the employer's articulated reasons are pretextual if it determines that the plaintiff was clearly better qualified than other employees[3]. "If the factfinder determines that Thornbrough [plaintiff] was clearly better qualified than the employees who were retained, it is entitled to conclude that the Railroad's [employer's] articulated reasons are pretexts." *Thornbrough, supra*, at 647.

In *Douglas, supra*, at 533 n.5, the Ninth Circuit rejected an approach, such as the Third Circuit's, which weighs if the articulated reason was factually correct. Instead, the Ninth Circuit suggests that the focus of the inquiry on pretext (concerning poor performance) is "whether there was sufficient evidence of unsatisfactory performance to be a legitimate concern of his employer." Using this standard, disputes as to the factual basis of the employer's legitimate reason preclude summary judgment only in the absence of some evidence to support the employer's concern.

A Writ of Certiorari is appropriate in the instant case to permit this Court to review this conflict between the Circuit Courts and resolve whether a dispute of the factual basis for the employer's legitimate business reason satisfies the employee's burden to show that the employer's reason is "unworthy of credence." *Burdine, supra.*

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[3]The Fifth Circuit candidly admits, at 647 of its Opinion that its decision stretches the principle of the ADEA "to its limit."

AGE DISCRIMINATION NEXUS

The second element of the Third Circuit's decision, concerning the absence of any requirement of an age discrimination nexus, directly conflicts with decisions from the United States Court of Appeals for the First, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits. Contrary to the Third Circuit's decisions in the case at bar and *Chipollini, supra*, these other Circuits require that a plaintiff must show a link between the alleged pretext and age discrimination to survive summary judgment.

The First Circuit, in *Dea, supra*, at 15 and *White, supra*, at 1043, held that "refuting or questioning the defendant's articulated reason" or "merely casting doubt on the employer's articulated reason" does not meet the burden of demonstrating age discrimination. *See also Gray, supra*, at 255-256 (that the discharge may have been arbitrary or due to ill will does not show that age was a motivating factor).

In *Dale, supra*, at 465, the Seventh Circuit expressly held that an age discrimination plaintiff must "establish a nexus between his evidence and age discrimination."

Decisions from the Sixth, Eighth, Ninth and Eleventh Circuits also indicate a conflict with the Third Circuit standard. In *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982), the Sixth Circuiit affirmed summary judgment because only personal conclusions by the plaintiff suggested that age was a factor in the decision. The Eighth Circuit in *Leichihman v. Pickwick International and American Can Co.*, 814 F.2d 1263, 1270 (8th Cir. 1987) held that "plaintiff must make *some* additional showing that age was a determinating factor." In *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983), the Ninth Circuit required "specific, substantive evidence of pretext and that age was a determining factor." In *Pace v. Southern Railway System* 701 F.2d 1383, 1391 (11th Cir.), cert. denied, 464 U.S. 1018 (1983), the Eleventh Circuit permitted summary judgment in the absence of evidence "which might infer that age was even a factor in the decision."

A Writ of Certiorari is appropriate to resolve the conflict among the Circuits concerning the requirement of a nexus to age as a reason for the discharge.

PRETEXT OF SOME BUT NOT ALL BUSINESS REASONS

The third element of the Third Circuit's standard, permitting an inference of age discrimination where some but not all of the employer's legitimate reasons for discharge are allegedly in dispute, is at odds with this Court's decision in *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 98 S. Ct. 2943 (1978). In *Furnco, supra*, at 577, this Honorable Court explained the reasons underlying the *McDonnell Douglas* standard and inference of discrimination:

> A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. See *Teamsters v. United States, supra*, at 358 n.44. And we are willing to presume this largely because we know from our experience that more often than not people do not act in a *totally arbitrary* manner, without any underlying reasons, especially in a business setting. Thus, when ***all*** legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with ***some*** reason, based his decision on an impermissible consideration such as race. (Emphasis added)

The Third Circuit's opinion in the case at bar reveals, on its face, certain uncontested legitimate reasons for the discharge. At page 9 of the Opinion, the Third Circuit states that "Sorba admits that the three jobs produced poor results for the company and that he

received complaints about his performance from both customers and his supervisors on the Little Blue Run job." (A-9). The Third Circuit also notes that Mr. Sorba's supervisors stated "that Sorba's performance on the three drilling operations was slower than they expected." (A-8). Although these admitted circumstances provide legitimate business reasons for the discharge, the Third Circuit reversed summary judgment holding that the dispute as to whether Sorba was ***responsible*** for these poor results permitted an inference of age descrimination. Petitioner respectfully submits that Sorba's responsibility for the poor results would constitute a separate and additional business reason. Discharge for the poor results occurring, whether or not due to Mr. Sorba's fault, is a legitimate business reason.[4] Mr. Sorba at no time proffered evidence that younger employees with equally poor results were not discharged.

Decisions from the First, Sixth and Seventh Circuits are at variance with the Third Circuit approach. In *Dea, supra*, the First Circuit affirmed summary judgment despite the employee's contention that the articulated business reason, misuse of gasoline, was pretextual and a cover-up of management errors. As the First Circuit stated at 15:

> "To be sure, Dea and defendants disagreed as to who was at fault for the misappropriation of gasoline. But even if Dea convinced a jury that he was fired to protect higher-ups from blame in the gasoline scandal, this would not show age discrimination. *It would merely provide another reason, totally unrelated to age, for his discharge.*" (Emphasis added)

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[4]In addition, in answers to interrogatories, Sorba provided an additional legitimate business reason—the President's inability to control his actions. *See* Opinion of District Court at 6, 7, (B – 5). If the employee states a legitimate business reason for his discharge, this should preclude an inference of age discrimination since a non-age related explanation for the employer's actions is provided. cf. *Furnco, supra*.

Similarly, in *Ackerman, supra*, at 70 and *Dale, supra*, at 465 n.9, the Sixth and Seventh Circuits respectively held that no showing of age discrimination was made where employees challenged the articulated legitimate reasons as pretextual, but offered other legitimate reasons (personality conflicts) as explanations for the discharge.

A Writ of Certiorari is appropriate to resolve the conflict between the Circuits and the Third Circuit's misapplication of this Court's *Furnco* decision.

CONCLUSION

Taken as a whole, the three elements of the Third Circuit standard precludes an ADEA defendant from obtaining summary judgment in virtually every case. As long as a plaintiff disputes the factual basis for one of the legitimate business reasons for discharge, the employer would be precluded from summary judgment. Particularly concerning small businesses with informal personnel policies, this standard is unduly burdensome. As the Seventh Circuit noted in *Kephart, supra*, at 1219, the availability of summary judgment in age discrimination suits is critical to avoid " the harassment of small businesses having informal personnel practices with unfounded suits."

Petitioner respectfully submits that there is confusion among the Circuits concerning the standard of proof for employees seeking to show that employers' legitimate reasons are pretextual. Clarification by this Honorable Court of the *Burdine* standard is appropriate, particularly in view of the too generous standard of the Third Circuit.

For all of the above reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JONES, GREGG,
CREEHAN & GERACE

By: _____
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DATED: September 14, 1987

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3688

WILLIAM SORBA,
Appellant

vs.

PENNSYLVANIA DRILLING COMPANY, INC.

Appeal from the United States
District Court for the
Western District of Pennsylvania
(D.C. Civil No. 85-819)

Argued May 12, 1987

Before: GIBBONS, *Chief Judge*,
MANSMANN, *Circuit Judge*,
KATZ, *District Judge**

(Filed June 18, 1987)

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*Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

This appeal raises once again issues most recently addressed by us in *Chippolini v. Spencer Gifts*, 814 F.2d 893 (3d Cir. 1987), regarding the appropriateness of summary judgment for the defendant employer in employment discrimination cases where the plaintiff has produced evidence to establish a *prima facie* case pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We held in *Chipollini* that to defeat a summary judgment motion based only on an employer's proffered evidence of a nondiscriminatory animus, an ADEA plaintiff's evidence need only permit a reasonable inference that the employer's proffered explanation for the discharge is unworthy of credence.

We find that the record before us contains "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) nondiscriminatory reasons." *Id.* at 900. Since the district court incorrectly required that the ADEA plaintiff's evidence establish a direct inference that the defendant discharged him because of his age, we will reverse the entry of summary judgment for the defendant employer.

I.

After 27 years of employment as a driller with Pennsylvania Drilling Company, William Sorba was discharged at the age of 54. Sorba avers in his deposition that younger drillers were retained and that, after Sorba's termination, younger drillers were called back from layoff, rehired or promoted from helper to driller.

Sorba brought suit in district court alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1932) (as amended) contending that his age was a factor in the employer's decision to discharge him. Pennsylvania Drilling answered that Sorba had been dismissed for unsatisfactory performance on his last three jobs between 1981 and April 18, 1983 the date of his discharge. After discovery, the employer moved for summary judgment and the district judge granted the motion. The court found that the employer had articulated valid non-discriminatory reasons for Sorba's discharge and that Sorba's factual allegations and evidentiary proffers did not present a triable issue of fact. Sorba appealed.

The district court order was entered on October 21, 1986. During the pendency of this appeal, we filed our opinion in *Chipollini* in which we explained that an ADEA plaintiff need not produce direct evidence of age discrimination in order to resist a motion for summary judgment based on the defendant employer's proffer of a non-discriminatory reason for the plaintiff's discharge. 814 F.2d at 894. Because this is a recurring area of confusion, we now reiterate much of what we said in *Chipollini* concerning the interrelationship of the shifting burden of production in discrimination cases with the burden of the employer as movant for summary judgment.

II.

Under the ADEA, a plaintiff must prove that age was a determinative factor in the defendant employer's decision to dismiss the employee. *See e.g., Duffy v. Wheeling Pittsburgh Steel Corp.* 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 469 U.S. 1087 (1984). A plaintiff may, of course, prove his case by direct evidence. However, in the absence of direct evidence a plaintiff may establish a *prima facie* case indirectly by proving by a preponderance of the evidence that the employee (1) belongs to a protected class; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. *See Maxfield v. Sinclair International*, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 796 (1986).

If the plaintiff succeeds in proving a *prima facie* case,the burden of production then shifts to the defendant to articulate some legitimate non-discriminatory reason for the discharge. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Should the defendant carry this burden, the plaintiff must prove by a preponderance of the evidence that the proffered reasons were not the employer's true reasons. *Id.*

In addition to establishing a *prima facie* case by indirect proof, an ADEA plaintiff can prevail by means of indirect proof that the employer's reasons are pretextual without presenting evidence specifically relating to age. *Chipollini*, 814 F.2d at 898. "[W]hen all legitimate reasons for rejecting an (employee) have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as

(age)." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis in original).

III.

Rule 56(c) of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, ___ U.S. ___, 106 S. Ct. 2548, 2553 (1986).

The ultimate burden of proof at trial will remain with Sorba, who must convince the factfinder that it is more likely than not that his age was a determinative factor in Pennsylvania Drilling's decision to terminate him. *See e.g. Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d at 1395. It is clear that the employer will be able to "articulate" a legitimate, nondiscriminatory reason for Sorba's dismissal. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973). Therefore Sorba's trial burden will include the requirement either to discredit the employer's proffered reasons or to prove by direct evidence that his age was a factor in the decision to dismiss him. *Id.*

Nonetheless, the burden of persuasion on summary judgment remains unalterably with Pennsylvania Drilling as movant. The employer must persuade the court that even if all of the inferences which could reasonably be drawn from the evidentiary materials of record were viewed in the light most favorable to Sorba, no reasonable jury could find in his favor.

"[T]o meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct evidence of a purpose

to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute." *Chipollini*, 814 F.2d at 899. Where, as here, a plaintiff has offered no direct evidence of discriminatory motive, questions regarding summary judgment on the issue of intent are subsumed under the inquiry into employer pretext. *Id.* at 898. If an employee introduces "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for non-discriminatory reasons," *id.* at 900. the district court may not grant an employer's motion for summary judgment.

When ruling on a motion for summary judgment, the judge's role "is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2511 (1986). The existence of a factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment only if the dispute is "genuine" and the fact is "material". *Id.* at 2510.

Thus where the factual dispute concerns employer motive, clearly a material issue in an ADEA case, the problem is to determine whether the dispute is genuine, that is, "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* This inquiry "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Id.* at 2512. In an ADEA case, the plaintiff must prove his case by a preponderance of the evidence. *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 738 F.2d 1393 (3d Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 542

(1984). Thus, where the employer has produced evidence of a non-discriminatory motive for the employee's dismissal, the appropriate summary judgment question is whether the evidence in the record *could* support a reasonable jury finding either that the plaintiff has shown age discrimination directly or that the plaintiff has shown that the employer's proffered nondiscriminatory reason is unworthy of credence. *Chipollini*, 814 F.2d at 898.

Our review is plenary. We must apply the same test the district court should have used initially to determine whether there is a genuine issue as to any material fact. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

IV.

It is undisputed that Sorba is able to introduce evidence to support a *prima facie* case of age discrimination under the ADEA. Pennsylvania Drilling claims Sorba was discharged for poor performance and has proffered evidence of unsatisfactory results on three of Sorba's drilling jobs between 1981 and the time of his discharge in 1983.

The decision to discharge Sorba was made by Tom Sturges, President of Pennsylvania Drilling. In his deposition, Sturges asserted that the decision was based on information to the effect that Sorba had performed poorly on his last three jobs, *i.e.*, that he padded jobs, accrued unnecessary overtime, caused morale problems by criticizing the company and refused on occasion to take direct orders. Deposition of Thomas B. Sturges, *reprinted in* Appendix at 216a-282a. The jobs were known as Little Blue Run, Emsworth Lock and Dam, and Hussey Metals. Sturges testified that he was not personally familiar with

Sorba's performance on these jobs and had based his decision to discharge Sorba on information received from Jack Woleslagle, Vice President and Manager of Division One, the test boring division, and Jim Dravenstott, Sorba's immediate supervisor. The depositions of both Woleslagle and Dravenstott are of record. Sturges also assertedly relied on information from Jim Adams, allegedly Sorba's foreman on the Hussey Metals job, but the record contains no statement by Adams. Sorba asserts that the criticism of his performance is unfounded. He asserts that he was dismissed because of his age.

As we must on summary judgment, we review the evidence in the light most favorable to the non-movant. Dravenstott and Woleslagle both stated that Sorba's performance on the three drilling operations was slower than what they expected. However, Dravenstott also testified that the Emsworth Dam job went as well as could be expected and, when asked whether Mr. Sorba's poor work performance caused problems with the job, he answered, "No, I don't think so." Deposition of James Dravenstott, *reprinted in* Appendix at 363. As to the Hussey Metals job, Mr. Dravenstott commented, "I don't know whether I had a real problem with his performance . . It wasn't going as good as I wanted it to. Whether it could have been done better or not, I don't know." *Id.* at 367. Dravenstott testified that Sorba's alleged detrimental influence on morale due to derogatory comments was "hearsay" and "rumors". *Id.* at 368. He admitted that he could not state for sure that the company lost money because of Sorba's performance. *Id.* at 371.

Woleslagle stated that he had "no problems" with Sorba. Deposition of Jack W. Woleslagle, *reprinted in* Appendix at 14, 15. He confirmed that on the Emsworth Dam project Sorba had encountered steel in

the hole and that there had been problems at the bottom of the shaft with a large void. *Id.* at 309. He testified that he was not aware that Sorba had created morale problems, criticized the company or attempted to have other employees extend work unnecessarily. *Id.* at 320-321. Woleslagle stated that he was unable to confirm that the company had lost money due to Sorba's performance on any job. *Id.* at 370.

Sorba admits that the three jobs produced poor results for the company and that he received complaints about his performance from both customers and his supervisors on the Little Blue Run job. Deposition of William Sorba, *reprinted in* Appendix at 181, 182. However, he claims that factors beyond his control were responsible. In answer to the defendant's interrogatories, Sorba asserted that no one in the company had more experience in drilling than he had and that he was always given the toughest jobs. He asserted that he was given no warning or reprimand before being discharged. For each of the three jobs which he allegedly mishandled, Sorba provided specific explanations which he asserts establish that it was not his fault that the specified jobs were not performed.[1]

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[1]Sorba asserted that on the Emsworth Dam project he had encountered problems with flooding, equipment failures, river traffic and adverse soil conditions. Defendant's Interrogatories to Plaintiff, *reprinted in* Appendix at 55. As for Little Blue Run, he asserted that he was hindered by a faulty derrick and defective legs on the rig, an ineffective system for anchoring barges and adverse weather conditions. *Id.* at 56. With reference to the Hussey Metal project, Sorba alleged that he encountered equipment failures and that the drilling was impeded by a large amount of steel and other foreign substance in the hole. He also alleged that his helpers on the job were inexperienced.

At his deposition, Sorba again noted the extent to which equipment problems caused delays. Deposition of William Sorba,

Were we at the trial stage, the issue would be whether the employer discharged Sorba because it believed that he was not performing satisfactorily or whether the employer was using this explanation as a pretext for another reason which the jury may infer to be age discrimination. It is undisputed that Sorba has offered no direct evidence of purposeful age discrimination. Consequently, the issue on summary judgment is whether Sorba has pointed to evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge which *could* support an inference that the employer did not act for nondiscriminatory reasons. *Chipollini*, 814 F.2d at 900.

In its consideration of Pennsylvania Drilling's summary judgment motion, the district court ignored the plaintiff's option to use indirect evidence in meeting his burden. In reviewing Sorba's submissions the district court wrote:

> [P]laintiff does not dispute that the last three jobs plaintiff worked on for the company produced poor results. Rather, he says these results were not his fault. This however, is irrelevant. Even if plaintiff performed admirably under the most adverse of circumstances, yet defendant held him responsible for the poor results, or in the alternative, merely fired plaintiff as a scapegoat, this does not establish an ADEA violation. *See Miller v. General Electric Company*, 562 F. Supp.

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reprinted in Appendix at 121. He recited his efforts to get other employees to take better care of the equipment and indicated that he was so concerned about the economic problems of the company that he had asked the company to convene a meeting of drillers and helpers to discuss a pay cut. *Id.* at 163. He also indicated that he tried to get the employer to change or improve the equipment. *Id.* at 121, 122.

> 610, 617 (E.D. Pa. 1982) (an employer's reasons for discharge may be short-sighted and narrow minded as long as age is not a determinative factor). . . *Taken as a whole we do not find that plaintiff's circumstantial evidence establishes a reasonable inference that defendant fired him because of his age.*

Sorba v. Pennsylvania Drilling Co., No. 85-819, slip opinion at 30, (W.D. Pa. October 21, 1986) (emphasis added).

The district court's error in this case is the same as that of the district court in *Chipollini*. To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.[2]

In this case, Sorba's trial burden will be to show that it is more likely than not that the employer did *not* discharge him because of the poor results on his last three jobs. Therefore, to defeat a summary judgment motion, the evidence need only establish a reasonable inference that the employer did *not* dismiss Sorba because of his poor performance.

---

[2]Pennsylvania Drilling urges us to adopt the result in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), an ADEA case in which the appellate court upheld a summary judgment for the defendant employer. The allegations in *Kephart* were very similar to those made by Sorba. However, the state of the record was different in *Kephart*. The court found that the plaintiff had not established a *prima facie* showing of discrimination and, having had a chance to examine the movant's witnesses at their depositions, the plaintiff had been unable to introduce *any* evidence indicating that their testimony was untrue. *Id.* at 1225. (emphasis added). Consequently, the reasoning in *Kephart* is inapposite here.

Sorba has introduced evidence to dispute the fact that his supervisors were dissatisfied with his work. Sorba does not dispute the fact that there were poor results on his last three jobs. He has proffered evidence, however, that his supervisors realized that the poor results were not his fault. Upon examination at their depositions, the testimony of the movant's witnesses was inconsistent regarding whether they believed Sorba's performance caused the unsatisfactory job results.

This is not to say that the jury must decide whether the poor results were, in fact, Sorba's fault. The jury must only assess the employer's credibility with respect to its proffered reason. The jury need only decide whether the employer dismissed Sorba because of reports from his supervisors that they believed Sorba to be responsible for the poor results. If not, it is more likely than not that the employer based his decision on an impermissible consideration such as age. *Furnco*, 438 U.S. at 577.

We find that Pennsylvania Drilling has failed to meet its burden on summary judgment. The record contains indirect evidence which, if credited by the factfinder at trial, would be sufficient to support a finding that it is more likely than not that the employer did not act for its proffered reason. Therefore, we will reverse the entry of summary judgment for Pennsylvania Drilling and remand the case for trial.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF PENNSYLVANIA

WILLIAM SORBA,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION
	:	NO. 85-819
PENNSYLVANIA DRILLING	:	
COMPANY, INC.	:	
Defendant.	:	

OPINION

WEBER, D.J.

Plaintiff brings this action alleging that defendant discriminated against him based on his age when the defendant company discharged him in August, 1983. Defendant has filed motions for summary judgment and in limine asking this court to dismiss this action or, alternatively, to exclude certain evidence plaintiff relies on and intends to present at trial.

Motion in Limine

Defendant's motion in limine seeks to bar plaintiff from introducing and relying on the following witnesses and evidence:

1. The discharge of Charles Triplett by Pennsylvania Drilling in 1976;
2. The discharge of Mr. Earl Hoffman in 1978;
3. Plaintiff's job performance on jobs prior to the Little Blue Run job in 1981; and
4. Plaintiff's job performance on jobs for other employers subsequent to his termination by Pennsylvania Drilling Company, Inc. on August 8, 1983.

In support of this motion, defendant has submitted statistical evidence establishing that 65% of the drillers (plaintiff's job classification) in defendant's employ at the time of plaintiff's discharge were over the age of 40 and thus in the protected class. Moreover,

defendant offers evidence of a legitimate business reason which relates primarily to plaintiff's activities on three jobs since 1981: Little Blue Run, Emsworth Lock and Dam, and Hussey Metals.

Defendant argues that evidence regarding the discharge of Mr. Tripplett and Mr. Hoffman, which are remote in time and unrelated to plaintiff's discharge, do not establish a pattern of age discrimination under any statistical model and should be excluded under F.R.E. 403. We agree that the evidence should be excluded. Plaintiff has not shown that a statistical pattern exists. The incidents are unrelated in time, and defendant offers evidence that it had a legitimate business reason for these discharges to rebut plaintiff's age discrimination allegations. Allowing evidence of these incidents would require the trying of three discrimination cases. Plaintiff's case is the only one we have before us, and, in the absence of any pattern, the evidence regarding the termination of Mr. Tripplett and Mr. Hoffman will be excluded.

Defendant argues that evidence of plaintiff's job performance prior to 1981 and following August, 1983 should be excluded as pertaining to an irrelevant time period and therefore not probative as to the central issue of whether age was a determinative factor in his discharge. In response, plaintiff represents that since defendant has claimed that plaintiff's poor job performance on three jobs led to his discharge, he should be permitted to give evidence of his overall work performance to show "pretext." Plaintiff represents that his testimony would cover specific job assignments that he had over the last years of his employment with defendant, and that any testimony regarding subsequent job performance would relate solely to the issue of damages.

In this action, plaintiff has the ultimate burden of proof. Plaintiff "may carry this burden *directly* by adducing evidence such as age-biased statements by his superiors which might persuade the court . . . [or] he may carry this burden *indirectly* by showing that the employer's proffered explanation for his dismissal should not be believed." *Keller v. Bluemle*, 371 F. Supp.

364, 369 (E.D. Pa. 1983) *aff'd.* 735 F.2d 1349 (3d Cir. 1984); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Plaintiff's testimony regarding his overall job performance during his last years of his employment with defendant may provide some circumstantial evidence to rebut defendant's legitimate business reason for the termination. Therefore, we find it relevant and we will allow it. Regarding evidence of subsequent job performance, we note that the quality of such performance is not necessary to show mitigation of damages, but the fact of subsequent employment is relevant. Therefore, relevant facts pertaining to subsequent employment will be admitted for the limited purpose of proving damages and mitigation hereof.

Motion For Summary Judgment

Defendant has moved for summary judgment, supporting his motion with three depositions and answers to interrogatories. Plaintiff has opposed the motion with evidentiary material of his own. Summary judgment is a drastic remedy and should only be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Conley v. Gibson*, 355 U.S. 41 (1957); *Hollinger v. Wagner Mining Equipment Company*, 667 F.2d 402, 405 (3d Cir. 1981). In deciding this motion, we must resolve any doubts against the defendant and draw all reasonable inferences in a light most favorable to the plaintiff. *Keller v. Bluemle, supra.*

Plaintiff indicates:

1. He was born on March 6, 1929 and discharged by defendant on August 8, 1983, thus he was 54 years old at the time of his discharge and within the protected class;

2. He was qualified for the job;

3. He satisfied the normal requirements of the job; and

4. Drillers who were younger than him were retained and/or called back from layoff, rehired or promoted from the status of a helper to a driller after his termination.

See deposition of William Sorba; Requests for Admissions. By these assertions, plaintiff satisifes his initial burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Defendant has come forward with evidence of its legitimate business reason for the discharge, indicating that at the time of his discharge, plaintiff was not satisfying the normal job requirements despite his overall qualifications for the job and his skill as a driller. Specifically, defendant contends that plaintiff performed poorly on his last three major jobs: Little Blue Run, Emsworth Lock and Dam, and Hussey Metals. Defendant also contends that plaintiff "padded" jobs, accrued unnecessary overtime, criticized the company causing employee morale problems, and refused direct orders of his supervisors on the Hussey Metals job. Under the *McDonnell Douglas* formula, this satisfied defendant's burden which is to come forward with evidence of a legitimate business reason for the adverse action. See *Burdine*, 450 U.S. at 254-55.

Plaintiff now attempts to resist summary judgment by raising a material issue of fact for trial. Plaintiff disputes the defendant's proferred legitimate reasons for the dismissal by offering the following indirect evidence of "pretext":

1. Plaintiff had a long history with the company and was the most experienced driller at the time of his discharge.

2. He was always given the toughest jobs.

3. He was given no warning of discharge or reprimand.

4. He was a "company man" and acted in the best interests of the company over time.

5. While plaintiff agrees that there were poor results on the three jobs cited by defendant, plaintiff states that these were due to problems beyond his control such as seepage and flooding, equipment failures, river traffic, as well as adverse soil conditions.

6. Plaintiff said he complained from time to time about equipment failures and problems with safety and dangerous conditions.

7. Plaintiff believes that Tom Sturges, President of the Company and a much younger man, fired him because Sturges generally lacked experience and felt that he (Sturges) could not control plaintiff due to plaintiff's broad experience, years of service with the company, and association with Sturges' father. *See* Sorba deposition and Plaintiff's Answers to Defendant's Interrogatories.

Plaintiff has the burden of proving that age was a determinative factor in his discharge by a preponderance of the evidence. *Duffy v. Wheeling-Pittsburgh Steel Corp.*, 728 F.2d 1393 (3d Cir. 1984), *cert. denie* 105 S. Ct. 542 (1984); *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980). In order to survive summary judgment, plaintiff must produce sufficient evidence to show a material factual issue. There is no dispute that plaintiff had a long history with the company. Nor is there any dispute about his experience. Furthermore, plaintiff does not dispute that the last three jobs plaintiff worked on for the company produced poor results. rather, he says these results were not his fault. This, however, is irrelevant. Even if plaintiff performed admirably under the most adverse of circumstances, yet defendant held him responsible for the poor results or, in the alternative, merely fired plaintiff as a scapegoat, this does not establish an ADEA violation. *See Miller v. General Electric Company*, 562 F. Supp. 610, 617 (E.D. Pa. 1982) (an employer's reasons for discharge may be subjective, short-sighted and narrow minded as long as age is not a determinative factor.) Moreover, if we accept everything the plaintiff says as true, this would lead to the conclusion that plaintiff was fired because the boss felt that plaintiff was too independent for the boss to control. This does not establish age discrimination. Taken as a whole, we do not find that plaintiff's circumstantial evidence establishes a reasonable inference that defendant fired him because of his age. A mere assertion, conjecture, or speculation by the plaintiff is not sufficient to establish a material factual dispute. Summary judgment will be granted in favor of defendant.

WILLIAM SORBA, *Plaintiff,*	:	
v.	:	CIVIL ACTION NO. 85-819
PENNSYLVANIA DRILLING COMPANY, INC. *Defendant.*	:	

ORDER

NOW this 21st day of October, 1986, IT IS ORDERED that defendant's motions in limine and for summary judgment are GRANTED in accord with the accompanying opinion. This ends all further proceedings in this action.

GERALD J. WEBER
United States District Judge

cc: M. E. Kusturis, Esq.
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(2)

Supreme Court, U.S.
FILED
DEC 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-442

In The

Supreme Court of the United States

October Term, 1987

PENNSYLVANIA DRILLING COMPANY, INC.,

Petitioner,

v.

WILLIAM SORBA,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether Claimant presented evidence which if believed raised a genuine issue as to a material fact, namely, pretext, so as to defeat summary judgment.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Table of Authorities	iii
Counterstatement of the Case	1
Summary of Argument	4
Argument	4
Conclusion	18

TABLE OF AUTHORITIES

Page

CASES:

Ackerman v. Diamond Shamrock Corporation, 670 F.2d 66 (6th Cir. 1982) 11

Anderson v. Liberty Lobby, Inc., — U.S. —, 106 S. Ct. 2343 (1986) 7

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987) 3

Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986) *cert. denied*, — U.S. —, 107 S. Ct. 954 (1987) 5, 7, 8, 15

Dea v. Look, 810 F.2d 12 (1st Cir. 1987) 8

Furnco Construction Corporation v. Waters, 438 U.S. 567, 98 S. Ct. 2943 (1978) 4, 5, 15, 16, 17

Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161 (8th Cir. 1985) 11

Leichihman v. Pickwick International and American Can Co., 814 F.2d 1263 (8th Cir. 1987) 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 6, 7, 12, 17

Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir.) *cert. denied*, 464 U.S. 1018 (1983) 13

Parcinski v. Outlet Company, 673 F.2d 34 (2nd Cir. 1982) 9

Smith v. Flax, 618 F.2d 1062 (4th Cir. 1980) 8

Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983) 12

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981) 7, 17

Wilkins v. Eaton Corporation, 790 F.2d 515 (6th Cir. 1986) 10

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

29 U.S.C. 621 *et seq.* 1

RULES:

Federal Rule of Civil Procedure No. 56(c) 5, 7

COUNTERSTATEMENT OF THE CASE

On April 8, 1983, after twenty-seven (27) years of employment as a driller with Pennsylvania Drilling Company (hereinafter "Employer"), William Sorba (hereinafter "Sorba") was discharged at the age of 54. Sorba brought suit in District Court alleging a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Section 621 *et seq.*, contending that age was a factor in the Employer's decision to discharge him. A-3.[1]

The decision to discharge Sorba was made by Tom Sturges, President of the Employer. Sturges asserted that this decision was based on information he had received to the effect that Sorba had performed poorly on his last three jobs, had padded jobs, accrued unnecessary overtime, caused morale problems by criticizing Employer and had refused on occasion to take direct orders, *i.e.*, was insubordinate. A-7. Of course, Sorba challenged these explanations by presenting specific testimony and evidence regarding the factual underpinnings of Employer's allegations. For example, Sorba gave his personal explanation for the poor results produced by the jobs which included reference to equipment malfunctions, soil conditions, weather and the like. A-9.

More importantly, however, Sorba conducted extensive discovery of Employer to ascertain the validity, accuracy and sincerity of the numerous reasons for discharge proffered by Employer. The deposition of Sturges was taken at which time he testified that while he was not personally familiar with Sorba's performance, he had based his de-

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[1]References are to Appendix in Employer's Petition.

cision to discharge Sorba on information received from Jack Woleslagle, Vice President and Manager of Division 1 of Employer, and Jim Dravenstott, Sorba's immediate supervisor. Their depositions were then taken. A-8.

Dravenstott testified that the Emsworth Dam job went as well as could be expected. As to Sorba's alleged poor work performance, he candidly admitted that he could not ascribe the problems with the job to Sorba. A-8. As to the Hussey Metals job, Dravenstott admitted that he really had no problem with Sorba's performance; he thought the job was going as well as he wanted. He candidly admitted that he did not know whether it could go better or not. A-8. As to Sorba's alleged detrimental influence on morale, Dravenstott indicated that his observations were based on "hearsay" and "rumors". A-8. Finally, he indicated that he could not state for sure that Employer lost money because of Sorba's performance. A-8.

Woleslagle, another management representative who Sturges indicated had been the source of information leading to Sorba's discharge, stated that he had "no problems" with Sorba. A-8. He specifically confirmed Sorba's rendition of problems encountered with the Emsworth Dam project stating that steel had been encountered in the drill hole and that there were problems at the bottom of the shaft with a large void. A-9. He stated that he was unaware that Sorba had created morale problems or criticized the company. Like Dravenstott, Woleslagle was unable to confirm that the company had lost any money due to Sorba's alleged poor work performance on any job. A-9.

At the point in time when Employer filed its Motion for Summary Judgment, it was undisputed that Sorba was

able to introduce evidence to support a *prima facie* case of age discrimination under the ADEA. A-7. Employer then proffered facially legitimate reasons for discharging him. To resist this, Sorba not only presented his own personal rendition of the facts and circumstances countering employer's proffered explanations for discharge, but presented detailed testimony from the President, Vice President and Sorba's immediate supervisor, which specifically *contradicted* and *undermined* Employer's proffered reasons for discharge. A-8, 9 and 10.

The District Court granted Employer's Motion for Summary Judgment. The Third Circuit found that once a *prima facie* showing of discrimination was made out, and an employer had posited legitimate reasons for discharge, all a claimant must do to survive Summary Judgment is present evidence raising a genuine issue as to a material fact. Absent direct evidence of age discrimination, a claimant could present evidence establishing that the employer's proffered reasons for discharge were a pretext, *i.e.*, that employer's proffered explanation is unworthy of credence. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir. 1987). The Court found, in effect, that the Employer's own evidence and testimony, aside from Sorba's personal rendition of the facts, clearly contradicted and undermined its reasons for discharge thereby raising a fact question as to this material issue. The Third Circuit therefore reversed the lower court's entry of Summary Judgment. Employer's Petition for Writ of Certiorari followed.

———o———

SUMMARY OF ARGUMENT

The basic analysis followed by each of the Circuit Court's cited by Employer was the same and was fully in accordance with the clearly enunciated position of the Supreme Court of the United States. Employer is attempting to create a legal issue where none exists. A careful analysis of the Circuit Court decisions cited indicates that, while the facts of each case differed, the legal analysis employed in each was similar and consistent with the analysis followed by the Third Circuit. A factual analysis of a claimant's evidence is compelled where grant of summary judgment is reviewed. Employer misreads *Furnco, infra.* The Third Circuit followed *Furnco.*

———o———

ARGUMENT

Employer has reviewed existing case law in the Circuits in an attempt to construct a legal issue to secure review of the adverse decision of the Third Circuit in the instant case. Employer contends that the First, Second, Sixth, Seventh and Eighth Circuits have held that the factual basis of the employer's reasons for discharge is not an issue in an age discrimination case. This, the Employer contends, is in conflict with the approach taken by the Third Circuit, along with the Fifth Circuit, which permits an analysis of the factual basis of the Employer's reasons for discharge. The Ninth Circuit, the Employer contends, has stated an approach which permits consideration of the factual basis, but only to determine if suf-

ficient evidence exists to establish a legitimate concern of the employer. Employer's Petition, p. 6.

The Employer argues that the Third Circuit's analysis requires a court to sit as a "super-personnel department" that re-examines Employer's business decisions. *Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986) *cert. denied,* — U.S. —, 107 S. Ct. 954 (1987). The Employer contends that the Third Circuit's standard, which authorizes judicial inquiry into the factual basis of the employer's legitimate business reasons, also conflicts with this Court's decision in *Furnco Construction Corporation v. Waters,* 438 U.S. 567 (1978), since Sorba allegedly failed to refute "all" legitimate reasons proffered by the Employer for his discharge. In support of this contention, Employer relies on Sorba's subjective rendition of the facts, but totally ignores, once again, the damning admissions of Employer's representatives as set forth hereinabove.

This case does not present the issue of whether the ADEA is a vehicle for the general judicial review of business decisions. Nor does the case raise the issue of whether a Court may review evidence of the factual basis for discharge. This, after all, seems mandated by Rule 56(c) of the Federal Rules of Civil Procedure, which sets forth the requirement, among others, that the party against whom a summary judgment is sought must have failed to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof.

The issue, simply put, is whether Sorba has presented evidence which, if believed, raises a genuine issue as to material fact. Since direct proof of age discrimination

may not exist in the record, Sorba has predicated his case on attempting to prove that the Employer's proffered reasons for discharge are pretextual. The Third Circuit was satisfied that he met this burden not, as the Employer would have it, through his own testimony or self-serving declarations, but, rather, through the Employer's own inconsistent and contradictory explanations. The other Circuit decisions taken as a whole seem to stand for the proposition that a claimant seeking to avoid summary judgment or simply attempting to meet his or her burden of proof at trial on the merits must rely on more than his or her own subjective second guessing of admittedly valid business decisions discharging them. In the instant case, Sorba presented substantial, indeed, overwhelming evidence which, if believed, conclusively established Employer's proffered reasons as mere pretext to cloak discrimination.

Commencing its analysis, the Third Circuit recited the general requirement that a claimant, under the ADEA, must prove that age was a determinative factor in the defendant employer's decision to dismiss the employee. Of course, this may be proven by direct evidence. However, in the absence of such evidence, a claimant may establish a *prima facie* case indirectly by proving various things. The Court noted that it was admitted that Sorba was able to introduce evidence to make out a *prima facie* case of age discrimination and, therefore, the Court moved on to the next step of the analysis. Having proven a *prima facie* case, the burden of production then shifts to the defendant to articulate some legitimate non-discriminatory reason for the discharge. *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973). Upon review of this mat-

ter, the Court concluded that the Employer articulated legitimate, non-discriminatory reasons for Sorba's dismissal. Sorba was obliged, therefore, to prove by a preponderance of the evidence that the proffered reasons were but a pretext for discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Since Employer sought summary judgment, the Third Circuit cited the applicable Federal Rule of Civil Procedure, Rule 56(c), and imposed on Sorba the burden of presenting evidence which, if believed, raised a genuine issue as to a material fact. Since pretext was a material fact, it was necessary to review, *but not weigh*, the evidence to determine whether there was a general issue for trial. *Anderson v. Liberty Lobby, Inc.,* — U.S. —, 106 S. Ct. 2505, 2511 (1986). A review of the other Circuit cases discloses a similar analysis, set against different factual backdrops.

In *Dale, supra,* the Seventh Circuit recited the shifting burdens of proof required by *McDonnell Douglas, supra,* and *Burdine, supra,* and framed the issue as being whether the claimant had refuted the proffered non-discriminatory reasons for discharge. The Court held that the claimant could point to "nothing in the record, beside his own perceptions, to support his assertion that his performance was adequate." *Dale, supra,* at 464. Terming the claimant's assertions as "self-interested, conclusory assertions of discrimination" combined with "dubious statistical evidence" the Seventh Circuit concluded that claimant had not rebutted the proffered explanation for discharge. *Id.* at 465. The Court further noted that the claimant's perception of himself was irrelevant; rather,

it "is the perception of the decision maker which is relevant." *Dale, supra,* at 465, quoting from *Smith v. Flax,* 618 F.2d 1062, 1067 (4th Cir. 1980).

The case seems to stand for the proposition that a claimant in an age discrimination case simply cannot rely on his own perception of events but must challenge by other evidence the posited reasons for discharge. The focus of inquiry must be on the perception of the decision maker —his reasoning--rather than the claimant's perception since, human nature being what it is, this is bound to be biased and self-serving.

In *Dea vs. Look,* 810 F.2d 12 (1st Cir. 1987), the First Circuit held that a claimant cannot meet his burden of proving "pretext" simply by questioning the employer's articulated reasons for discharge. After "extensive" discovery the Court concluded that all claimant could present was evidence "casting doubt on the correctness" of the employer's proffered reasons for discharge. *Id.* at 15. This, as a matter of law, was insufficient to prove pretext or discriminating intent. "When faced with indicating what he would prove to show that Defendants' explanation was a mere pretext, Dea merely indicated that the reason for his firing was his own version of the controversy . . . ." *Id.* at 16. Such was insufficient to prove that the Defendants' reason was a pretext for age discrimination.

Clearly, Sorba did not rely exclusively on his own rendition of the facts. Of course, he had his own explanation for what had happened. But, unlike the claimant in *Dea,* Sorba profited from his discovery which yielded damning admissions from the Employer's representatives. The President of the company who personally fired him ad-

mitted that he had no first hand knowledge about Sorba but had relied on information provided him by his subordinates. A-7,8. Sorba then deposed these individuals. Woleslagle, a Vice President, and Dravenstott, Sorba's immediate supervisor, both testified extensively that they generally had no problem with Sorba. Neither of them had anything bad to say about Sorba and, when questioned about poor work performance, they actually verified Sorba's rendition of mitigating circumstances. Likewise, when the questioning turned to matters of whether the company had lost money on these jobs or whether he had made derogatory comments about the company, neither of these witnesses were able to confirm these allegations. A-8. It was the Employer's *own* witnesses who contradicted the reasons articulated by it for Sorba's discharge.

In *Parcinski v. Outlet Company,* 673 F.2d 34 (2nd Cir. 1982), the Second Circuit heard the appeal of an employer after a jury had rendered a favorable verdict for an age discrimination claimant. On reviewing the record, the Court concluded that the record "is utterly devoid of any proof of discriminatory motivation" on the part of the employer. *Id.* at 37. The Court specifically concluded that claimant's evidence amounted to the second guessing of corporate decisions which, while raising matters of concern to the employer, were simply not "pretextual arguments" *Ibid.* In effect, there was simply no evidence indicating that the employer in that case had made anything other than a rational business decision dictated by financial circumstances beyond its control and what it thought would be an economically wise elimination of the claimant's job. This is clearly distinguishable from the

instant case, where substantial evidence exists indicating that the Employer's reason for the discharge was anything but reasonable and rational but, rather, so clearly inconsistent and contradictory as to raise an inference of "discriminatory animus". *Ibid.*

In *Wilkins v. Eaton Corporation,* 790 F.2d 515 (6th Cir. 1986), the Sixth Circiut used the same analysis as the Third Circuit employed in the instant case. Once the employer articulated a legitimate reason for its action, the claimant was obliged to prove that the stated reason was a mere pretext or cover-up for what was in truth a discriminatory purpose. *Id.* at 521. Apparently, a pilot had refused to utilize a flight check list *mandated* by his employer because the pilot thought the same was biased towards younger pilots and, worse yet, arguably unsafe. The pilot admitted that it was a mandatory requirement and further admitted that he refused to use it. He even admitted that the employer probably thought that the flight check list was a matter of concern to the employer as to safety. The Court concluded, however, that the claimant had introduced no evidence that the employer's proffered reason was a pretext.

All of the employer's witnesses testified, without contradiction, that the pilot's outright refusal to use the checklist was the basis for his dismissal. *Id.* at 521. While noting that a fact finder may not focus on the soundness of the employer's business judgment, the Court simply found that the claimant had failed to introduce *any* evidence establishing pretext. In fact, the pilot's rendition of the events leading to his discharge actually agreed with that of the employer's witnesses. *Ibid.* "There was no evi-

dence at all that Eaton adopted this checklist as a pretext for discriminating against Wilkins; even Wilkins testified that Eaton management probably thought the checklist would increase the safety of flights." *Id.* at 522.

In *Holley v. Sanyo Manufacturing, Inc.*, 771 F.2d 1161 (8th Cir. 1985), the Eighth Circuit was confronted by another situation where a claimant, in an attempt to prove his case, offered nothing more than his own "subjective reactions" to the decision by his employer to terminate him. *Id.* at 1168. The claimant made absolutely no showing that the employer's proffered reasons for discharge, namely a plant-wide reduction in force, was anything other than a carefully planned business decision to spread the negative impact of layoffs over all groupings of employees regardless of their race, sex and age. Simply put, the claimant's evidence "makes no showing that Sanyo's articulated reasons for discharge were pretextual." *Ibid.*

While it is true that this decision, like many of the others, contains the general proscription against examining the soundness of an employer's business judgment, it does not stand for the proposition that the Court is precluded from an analysis of the factual basis of the employer's decision. If, on examining the factual basis of the employer's proffered reasons for discharge, the Court concludes that those reasons are inaccurate or, as in the instant case, clearly contradicted by the employer itself, it can hardly be said that the reviewing Court is attempting to second guess the soundness of the employer's business judgment. The Third Circuit did not substitute its own judgment for the business judgment of the Employer in the instant case. Rather, the Court reviewed in detail the specific testimony of Employer's representatives and con-

cluded that the testimony not only contradicted its proffered reasons for discharge, but actually undermined the Employer's position and supported Sorba's position.

In *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982), the Sixth Circuit determined that the only evidence of record regarding the employer's reasons for suggesting to a claimant that he take early retirement (which the claimant voluntarily opted for) was that the employer made a legitimate business decision to eliminate claimant's position in an effort to "increase corporate efficiency." *Id.* at 70. The Court found that the claimant attempted to refute this with nothing more than "personal conclusions" that age was a factor. *Ibid.* There was simply nothing of record to support the claimant's bald assertion that age discrimination was involved except claimant's own beliefs which were far from unequivocal.

Once again, this case is clearly distinguishable from the facts confronting the Third Circuit. There was overwhelming evidence of record that the Employer's reasons for Sorba's discharge were something other than a response to an economic downturn, a desire to increase corporate efficiency, an effort to improve corporate morale, or simply disciplinary action. Rather, the propriety, legitimacy, and, indeed, the sincerity of the proffered reasons for discharge were drawn into question thereby raising a fair inference that the employer's proffered reasons were a mere pretext for discrimination.

In *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983), the Ninth Circuit recited the well-established law set forth in *McDonnell Douglas* and *Burdine*. After reasons for discharge were proffered, the claimant was re-

quired to "demonstrate that Motorola's explanation was but a pretext for discrimination." *Id.* at 393. The Employer suggests that the approach of the Ninth Circuit is at variance with the approach taken by the Third Circuit since the Ninth Circuit required "specific, substantial evidence of pretext and that age was a determining factor." *Ibid.* Noting that a claimant in an ADEA case must tender a genuine issue of material fact as to pretext in order to avoid summary judgment, the Court found that the claimant "produced no facts which, if believed, would have shown pretext and thus tendered an issue for trial." *Ibid.* Once again, a claimant's mere conclusory allegations, absent additional evidence, were insufficient to establish pretext. In the instant case, the record on appeal fairly abounds with facts which, if believed, would establish that the Employer's reasons were pretextual.

In *Leichihman v. Pickwick International,* 814 F.2d 1263 (8th Cir. 1987), the Eighth Circuit dealt with a situation where an employer, during an economic downturn, consolidated a claimant's position with that of a younger employee, and retained the younger employee. The case stands for the proposition that the ADEA does not create an "automatic presumption" of discrimination but requires that a claimant must make some additional showing that age was a determining factor. *Id.* at 1270. On review, there was absolutely no evidence that the employer's decision was anything other than a rational business move during an economic downturn.

In *Pace v. Southern Railway System,* 701 F.2d 1381 (11th Cir. 1983), *cert. denied,* 464 U.S. 1018 (1983), the Eleventh Circuit concluded that a claimant had failed to

prove a *prima facie* case of discrimination. In attempting to resist a motion for summary judgment, the Court concluded that a claimant cannot rely on "attenuated possibilities" from which a jury may infer a discriminatory motive, but must come forth with evidence to establish a *prima facie* case and then respond sufficiently to any "rebuttal" by the Defendant so as to create a genuine issue of material fact. *Id.* at 1391. The claimant apparently failed to respond at all to the employer's reason for discharge. *Id.* at 1392, note 8. Once again, this case is clearly distinguishable from the facts in the instant case.

Each of the Circuit decisions cited appear to rely on the same legal analysis. The Employer's contention that some of the Circuits have "held" that the factual basis of an employer's reasons for discharge are simply not an issue in age discrimination cases is simply not borne out by a close reading of the cases. In many of the cases, as noted above, the Court simply found that the claimant had failed to introduce sufficient evidence which, if believed, raised a question as to the Employer's reasons for discharge. Each of the cases contains a thorough review of the facts as alleged by the claimant. None of the Circuit Courts have held that the Court cannot, or should not, review the factual basis of the employer's reasons for the discharge. The Employer has simply confused the position taken by many of the Courts, that the ADEA does not authorize judicial review of business decisions, to mean that the Court is barred from reviewing the factual underpinnings of those business decisions. This is mixing apples and oranges.

Similarly, Employer's contention that the Third Circuit's decision is in conflict with some of the other Cir-

cuits, in that it fails to require a claimant to establish a "nexus" between a claimant's evidence and age discrimination, is similarly lacking in merit. As an example, in *Dale, supra,* at 465, the Court does recite the requirement that a claimant must establish a nexus between his evidence and age discrimination in that, "but for" his age, he would have not been terminated. As to how one would prove this, the Seventh Circuit noted that it was incumbent on the employee to "refute" the specific explanations for his discharge given by his employer. *Id.* at 464.

The Court found that the employee could only rely on his own deposition to rebut the criticisms of his superiors. "The question is not whether the Tribune exercised prudent business judgment, but whether Dale has come forward to refute the articulated, legitimate reasons for his discharge." *Ibid* (citation omitted). Had the employee presented evidence, aside from his own self-interested assertions, showing that the employer's explanations were unworthy of credence or mere pretext, Dale would have survived summary rejudgment. The so-called "nexus" requirement appears to be another way of stating that an employee is obliged to rebut the employer's proffered explanation for discharge with something more than self-interested, conclusory assertions of discrimination. *Id.* at 465.

Finally, the Employer suggests that the Third Circuit "standard" permits an inference of age discrimination where *some* but not *all* of the employer's legitimate reasons for discharge are allegedly in dispute. Citing *Furnco, supra* at 577, Employer contends that the Third Circuit's opinion reveals certain uncontested legitimate reasons

proffered by the employer and, therefore, states a rule at variance with this Court's decision in *Furnco*. This argument is without merit for two reasons.

First, the Employer is misreading *Furnco, supra*. The quote relied upon by Employer is part of the *rationale* of the Court easing the evidentiary burden of a claimant. *Furnco* stands for the proposition that a *prima facie* case of discrimination may be established by indirect, as well as direct, proof. Hence, where there is no smoking gun of discrimination, *i.e.*, direct evidence of age discrimination, one can prevail by establishing that the proffered reasons for discharge are pretextual since human nature dictates that business entities do not fire people for *no* reason. *Id.* at 578. In this sense, the Third Circuit strictly adhered to this Court's pronouncement. A-4, 5 and 12.

Second, however, Employer's argument assumes that Sorba failed to introduce some evidence which, if believed, contradicted the Employer's contention that poor results were generated from three jobs due to Sorba's poor work performance. Employer's Petition 10 and 11. As noted by the Third Circuit, the President of Employer candidly admitted that he was not personally familiar with Sorba's performance on these jobs. Sorba's immediate supervisor, Dravenstott, could not fault Sorba's performance as the cause for the problems with the jobs. Likewise, he could not state for sure that the company lost money because of Sorba's performance. A-8. Woleslagle, Employer's Vice-President, also stated that he was unable to confirm that the company lost money due to Sorba's performance from a job. A-9. Hence, it is improper to characterize the Employer's contention that Sorba's poor work performance

caused poor results for the company as "uncontested". Employer's Petition, 10.

The decision of the Third Circuit in the instant case does not conflict with the decisions of the other circuits and does not misapply this Court's decision in *Furnco, supra.* Each of the Circuit decisions appear to rely on the well-settled principles enunciated by this Court in *McDonnell Douglas, supra,* and *Burdine, supra,* and differ only as regards the evidence adduced by the claimant in support of his or her claim. In the instant case, Sorba presented overwhelming evidence which, if believed, could lead a jury that the employer's reasons for discharge were a mere pretext for age discrimination. It is obvious from a review of the Circuit decision cited, that many of the claimants failed to adduce such evidence. Each of the Circuits conducted a thorough review of the facts as presented by the claimants and each permitted the claimant to prove his case indirectly by establishing that the employer's reasons for discharge were pretextual. In this regard, the decisions of the Circuits are consistent.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be refused.

Respectfully submitted,

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